

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 SHAREEFAH KHALID ALGHANIM,

4 Petitioner,

5 v.

17 MC 406 (PKC)

6 SANTANDER BANK, N.A., et al.,

7 Respondents.

8 -----x

New York, N.Y.

9 May 1, 2018

3:00 p.m.

10 Before:

11 HON. P. KEVIN CASTEL,

12 District Judge

13 APPEARANCES

14 EMERY CELLI BRINCKERHOFF & ABADY, LLP

15 Attorneys for Petitioner

16 BY: O. ANDREW F. WILSON

ASHOK CHANDRAN

17 LANKLER SIFFERT & WOHL LLP

Attorneys for Respondent

18 BY: FRANK H. WOHL

BEN ARAD

1 (Case called)

2 THE DEPUTY CLERK: For the petitioner.

3 MR. WILSON: Good afternoon, your Honor. My name is  
4 Andrew Wilson of the law firm Emery Celli Brinckerhoff & Abady,  
5 and I'm here this afternoon with my colleague, Ashok Chandran.

6 THE COURT: Good afternoon to you, both.  
7 For the respondent.

8 MR. WOHL: Good afternoon, your Honor. Frank Wohl  
9 from the law firm of Lankler Siffert & Wohl. With me is my  
10 associate Ben Arad and our paralegal Eugenie Dubin.

11 THE COURT: Good afternoon. Nice to see you,  
12 Mr. Wohl, and good afternoon, everyone.

13 It seems to me that everyone did a good job on the  
14 briefing, and the issues are now, as far as I can tell,  
15 narrowed down as to whether or not the discovery meets the  
16 requirement of "for use" in a foreign proceeding, including  
17 under the reasonably contemplated test.

18 And then under the *Intel* factors, there is a question  
19 of whether the respondent is a de facto party to the foreign  
20 proceeding, whether the discovery is really sought against a  
21 party, not that that's dispositive of anything, but it is a  
22 factor to be considered under *Intel*. And then finally, whether  
23 it's unduly intrusive or burdensome.

24 So let me give the applicant the first opportunity to  
25 speak.

1 MR. WILSON: Thank you, your Honor.

2 I'll organize my remarks along the three questions  
3 that you have identified.

4 THE COURT: Are those the right three questions?

5 MR. WILSON: They are the exact three questions that I  
6 had prepared, your Honor.

7 THE COURT: Okay.

8 MR. WILSON: The first looks at the one statutory  
9 prong that's contested, and that is whether or not the material  
10 is being sought for use in a foreign proceeding.

11 I think before diving into the legal analysis, it  
12 might be helpful to lay out just a brief timeline that orients  
13 us as to what's been going on in the British Virgin Islands  
14 proceeding.

15 Basically back in 2012, Thunayan Alghanim, who is the  
16 brother of the applicant here, Shareefah Alghanim, retained  
17 Akin Gump to be an attorney for the company that these two  
18 siblings owned together called FMA, Future Media Architects.

19 At that time, Thunayan, as he remains, was the  
20 managing member of this company. About a year after he  
21 retained Akin Gump, Shareefah commenced proceedings in the  
22 British Virgin Islands on the grounds that her brother was  
23 behaving erratically and that he was not conducting the affairs  
24 of the company in accordance with the best interests of the  
25 company. This, as your Honor will have read in the papers, is

1 a company that owns, buys, and sells domain names.

2 After commencing the litigation in 2013, in 2014, in  
3 about a year, the parties agreed to hold that litigation in  
4 abeyance while they worked out amongst themselves whether they  
5 could work through the issues that they were having in the  
6 company.

7 I think it's notable that between 2014 and today, to  
8 give your Honor a sense of the volume of transactions, FMA has  
9 sold approximately \$24 million in domain names, and the issue  
10 that has arisen is that of that \$24 million, only \$9 million of  
11 the assets have been accounted for.

12 So through a combination of ongoing concerns about  
13 Thunayan's behavior -- it's in the record that he has struggled  
14 with drug addiction problems -- and in addition the concern  
15 about where this money has gone, Shareefah, in 2017 began  
16 seeking 1782 discovery to ascertain the location of the assets  
17 and the status of the FMA.

18 THE COURT: This was the proceeding in the Southern  
19 District of Florida resulting in the subpoena on Citigroup  
20 which Citigroup complied with which brings us where we are  
21 today.

22 MR. WILSON: Exactly, your Honor.

23 So when we step back and ask the question whether or  
24 not the 1782 that's before you to take documents from Akin Gump  
25 is for use in the BVI proceedings, I think there are really two

1 questions, two ways to look at that: One is are those  
2 proceedings amenable to receive document discovery right now.  
3 Are they open. Are they ongoing.

4 The issue that Akin has raised is that those  
5 proceedings are not active. Basically since 2015 when the  
6 receiver resigned, there hasn't been much, if any, activity in  
7 that litigation.

8 Our argument is that whether the litigation is active  
9 or not is not the standard. The question is whether the  
10 proceedings exist, whether they're open. It's common ground --

11 THE COURT: Let's assume for the moment that they're  
12 not open. If they're not open but they're reasonably  
13 contemplated, the provision is satisfied. Correct?

14 MR. WILSON: Yes, your Honor.

15 THE COURT: What's the significance of the proceeding  
16 being open, other than a fact that a court can take account of  
17 in deciding whether it's for use?

18 MR. WILSON: Your Honor, it's a vestige of our  
19 briefing in this case in that when we initially moved ex parte  
20 to obtain the right to serve the subpoena, we presented the  
21 Court with a declaration from Shareefah which identified these  
22 proceedings as being open, and those proceedings are the ones  
23 that she expects to make a further application to get further  
24 relief. So that was the hook, if you will, for purposes of  
25 obtaining the subpoena.

1 To the extent that we're now in a position where there  
2 are questions about the viability of those proceedings, I  
3 certainly can answer those. But your Honor is correct. We  
4 don't need to satisfy that prong using the BVI proceedings.  
5 The fact that Shareefah is actively preparing materials to seek  
6 further relief satisfies the reasonably contemplated test.

7 THE COURT: One of the statements that was made in the  
8 original application to the issuance of the subpoena in this  
9 district was that your client is making a showing that she  
10 seeks the information to "trace and recover assets" due to her  
11 from the sale of FMA assets, a process undertaken with the  
12 knowledge and approval of the BVI court. That's the  
13 application at paragraph 2.

14 What's the basis for that statement?

15 MR. WILSON: That statement refers to the process that  
16 began in 2013 when a receiver was appointed. The receiver has  
17 now resigned as of 2015, but what's happened is that in 2014,  
18 before the receiver resigned, the parties were engaged in that  
19 exact process and were effectively working together.

20 That has broken down, and so this is the continuation  
21 of that process. I think that -- so that's the reference.

22 THE COURT: But that is a bit conflated there. It  
23 sounds a bit to me like you're sitting across a negotiating  
24 table and you're saying, well, show me where the assets went.

25 And a person says, fine. I'll do that. And a court

1 is generally aware that the parties are engaging in some sort  
2 of settlement process and is very happy that they're doing it,  
3 approves of it in that sense. But that's quite different in  
4 kind and character from a judicial proceeding to accomplish  
5 that result.

6 MR. WILSON: You're right, your Honor. To the extent  
7 that the declaration as drafted gives the Court the impression  
8 that there is ongoing court oversight to this process, then  
9 that overstates the process.

10 What we have is effectively the continuation of this  
11 process without direct relationship with the court. This is a  
12 position where after obtaining the documents and analyzing  
13 them, the expectation is to go back under that same index  
14 number and seek further relief.

15 THE COURT: All right.

16 MR. WILSON: In closing with respect to that prong,  
17 your Honor has already invoked this test, but under *Mees v.*  
18 *Buiter* and even under *Intel* itself, courts in the United States  
19 recognize that individual applicants can obtain documents for  
20 use in proceedings that are anticipated, and I think that is  
21 the most accurate way to describe what we have here in  
22 Ms. Alghanim's application.

23 Turning to Akin Gump as a source for these documents  
24 and whether or not under the discretionary factors the law firm  
25 is a de facto party and, therefore, that status would militate

1 against production, I think the core inquiry here is whether or  
2 not the foreign tribunal has the ability, the control, to  
3 obtain these documents or not.

4 It's a substantive inquiry as to whether or not these  
5 materials are available in the forum proceeding, not a  
6 categorical one, whether a law firm of a party is amenable to  
7 this kind of discovery.

8 I think the best way to understand this distinction is  
9 to compare two cases that were cited in Akin Gump's papers,  
10 both involving the law firm of Cravath Swain & Moore. The  
11 first is from the Second Circuit in 2003 which is the *Schmitz*  
12 *v. Bernstein* case, and the second case is *In re Kiobel*, which  
13 is a case from Judge Hellerstein in 2017.

14 In the *Schmitz* case Cravath succeeded in effectively  
15 quashing a 1782 subpoena using this argument, that in effect,  
16 Deutsche Telekom, their client in the German proceedings, could  
17 provide the documents as readily as they could:

18 I think there are two aspects that are significant  
19 about that case. One is that the German authorities in that  
20 case had specifically requested that the federal courts in the  
21 United States not provide the discovery because to do so would  
22 interfere with an ongoing criminal investigation. So the core  
23 holding in the case focuses on the extent to which discovery  
24 would be antithetical to the comedy concerns that really  
25 animate 1782.



1           The court also did note that because DT was a party in  
2 the foreign proceedings, that presumptively the need for the  
3 documents was lower because the court presumed you could obtain  
4 them from DT.

5           Then I think it's instructive to then compare that  
6 against *In re Kiobel* where Cravath, 14 years later, cites the  
7 same case in furtherance of the same argument. In that case,  
8 there involved discovery that related to Shell Corporation in a  
9 Nigerian action. The court there noted that the focus of the  
10 subpoena is on the need for the documents and "the foreign  
11 tribunal's ability to control the evidence."

12           The court awarded discovery against Cravath in that  
13 case really for two reasons: One was legal, and one was  
14 practical. The legal reason was that in that case the  
15 complaint had not yet been filed.

16           So we had a situation where the applicant did not have  
17 access to the discovery vehicle in the foreign jurisdiction  
18 because they were trying to prepare a complaint to make a  
19 sufficient showing to make their application to the court. So  
20 as a legal matter, discovery wasn't available to the applicant.

21           As a practical matter, the court noted that the  
22 documents that were being sought, which were deposition  
23 transcripts -- it wasn't readily apparent that Shell would have  
24 them themselves and that the law firm was most likely to  
25 possess the physical documents.

Turning to our case, in terms of the legal analysis, because as we've just discussed, the proceedings in the BVI are in a state of inactivity. There is no immediate availability of discovery in that process.

Akin has pointed out that Ms. Alghanim could go into the BVI courts and initiate applications for discovery, etc. But as we stand here today, they're not in an active discovery process. So I think it's more analogous to *Kiobel* in that respect.

More profoundly though are the practical concerns. If we turn back to the timeline I gave before, Akin Gump has been a key player in helping to manage the affairs of FMA for a four-year period, from 2012 to 2016.

And we're now in a situation where the principal, who had retained Akin who is the partner, Thunayan Alghanim, is effectively out of touch with all parties.

THE COURT: Is Thunayan a party to the BVI proceeding?

MR. WILSON: Well, your Honor, I don't know how to answer that definitively. I know that FMA was represented by counsel that was retained effectively by Akin Gump in those proceedings as local counsel and that it was an adversary proceeding where Shareefah was represented by one firm and effectively Thunayan was controlling the other attorneys. I don't know whether it was in his personal capacity or corporate capacity.

1 THE COURT: What's his status with respect to the  
2 corporate entity, FMA?

3 MR. WILSON: He continues to be a 50 percent  
4 shareholder and the managing member of FMA. The problem is  
5 that he is in comunicado, and we have that in the record  
6 before your Honor because Akin Gump has tried -- I believe the  
7 count is 13 times -- to get in touch with him through all  
8 manner of communication, including attempts to personally  
9 communicate with him, without success.

10 Unfortunately, this is a situation where the principal  
11 appears to be embroiled in substance abuse problems and other  
12 issues which make him unavailable. I think that  
13 unavailability, which we have in the record, is one of the  
14 principal reasons that we need to obtain the documents from his  
15 counsel.

16 I think also one can infer that unlike a situation  
17 where you have Deutsche Telekom, a corporate entity that may  
18 house a variety of documents that the *Schmitz* court would be  
19 available in the forum proceeding, here we have an individual.  
20 And in effect, he has been running FMA through a series of  
21 advisers that include the accounting firm that we have a 1782  
22 from who were getting documents from the bank and his lawyers,  
23 Akin Gump.

24 THE COURT: Does FMA have a board of directors?

25 MR. WILSON: No. My understanding is that FMA is

1 effectively Thunayan Allergan. And his sister, as the record  
2 shows, has provided some capital from time to time as necessary  
3 to maintain the payment of the renewal licenses.

4 So I think, from our perspective, the reason that we  
5 need to get the materials from Akin Gump is because there is no  
6 practical alternative, both as a matter of fact in that it's  
7 unlikely that Thunayan himself has these documents. If he has  
8 some of them, he certainly does not have all of the 7,000 that  
9 Akin Gump says are potentially responsive.

10 Secondly, as we sit here today, there is not an active  
11 discovery process in the BVI which would naturally be  
12 available, which certainly it could be undertaken, but our  
13 reading of the cases under 1782 is that that's not a  
14 requirement, to have a local exhaustion of remedies, before we  
15 seek the material here.

16 So the final question --

17 THE COURT: What distinguishes your application from  
18 just a more generalized fishing expedition just to see what  
19 there is in the bank records, whether there is something  
20 unusual?

21 What's the difference between looking for a claim and  
22 looking for support for a claim? And does that make a  
23 difference where there is not a proceeding, effectively there  
24 is not a proceeding alive and well at the moment and you're  
25 arguing that one is reasonably contemplated?

1 MR. WILSON: Well, your Honor, we've seen what this  
2 proceeding looks like because it was effectively commenced with  
3 the receiver back in 2013, and effectively what is contemplated  
4 is a continuation of that process.

5 THE COURT: You're going to have to educate me, but  
6 with the receiver, I would think the receiver is the active  
7 pursuer of information, not the party who sought the  
8 appointment of the receiver.

9 Once the court says, that sounds like a great idea.  
10 I'm going to appoint a receiver, then the party who sought the  
11 appointment of the receiver steps aside in favor of the  
12 receiver who is then the principal actor. No?

13 MR. WILSON: You're absolutely right, your Honor. But  
14 I wasn't meaning to say that Shareefah would be seeking the  
15 appointment of a receiver again. What I meant was in terms of  
16 understanding the nature of the claim and whether this is like  
17 an inchoate fishing expedition or something more specific, what  
18 I meant to say is that what has already happened in this case  
19 is that when the assets of the company have not been adequately  
20 managed, i.e., that the registration payments have not been  
21 made, Shareefah has stepped in to seek court efforts to prune  
22 the inventory and pay for those assets that need to be  
23 maintained in the service of protecting assets of the  
24 corporation.

25 I think the two forms of relief that have been spoken

1 to to one degree or another in the papers are the need for  
2 control of FMA on the one hand and, secondly, the need to trace  
3 assets or effectively have an accounting of the corporation.

4 This is not a very complicated corporation in terms of  
5 its business. It buys and sells one asset, which is domain  
6 names. We know that there is an inventory of those names. So  
7 we're not seeking a claim. I think the claim is quite precise.  
8 It's that assets have been sold, and they have been divided  
9 adequately, and funds have been expended, not for business  
10 sources.

11 So what Ms. Allergan is doing right now with the  
12 series of 1782s is that she is steadily obtaining records from  
13 financial and accounting and now a law firm in order to trace  
14 what domain names were bought, what domain names were sold, and  
15 where the money went from those purchases and sales because she  
16 knows that there is at least \$3 million that should have come  
17 to her that is missing and maybe more.

18 And her efforts have borne fruit. In some of the  
19 other documents that we have received, there has been evidence  
20 of unusual accounting practices, mislabeled payments, wire  
21 transfers that appear to be made to relatives of advisers to  
22 Mr. Allergan.

23 So we have real verifiable, sober concerns about how  
24 the money has been used. And those concerns are also  
25 compounded by Mr. Allergan's apparent -- well, his drug

1 problems which give rise to concerns that he may not be  
2 completely in control of his own decision-making.

3 THE COURT: All right.

4 MR. WILSON: The third question that you had raised,  
5 your Honor, is whether or not the scope of the application is  
6 reasonable. We have advanced several arguments on that matter.

7 The three that I'll highlight for the Court are to the  
8 extent that some of the documents that are not privileged at  
9 all, whether those are that privileged come within the  
10 fiduciary exception, and whether privilege has been waived by  
11 the failure to provide a privilege log. Then finally, we've  
12 also provided a revised subpoena as a proposal in the event  
13 that the Court continues to have any concerns about the scope.

14 So with respect to the first category, if we start  
15 with the 7,000 documents that are potentially responsive that  
16 Akin Gump has noted, given the nature of the documents that  
17 we're seeking, our presumption is that many of them, perhaps  
18 most of them, are in the nature of documents with  
19 counterparties that are purchasing and selling these domain  
20 names which presumptively would not be privileged.

21 Then there would be certain accounting and banking  
22 records which also would not involve the provision of legal  
23 advice. So just as a threshold matter, it would seem that  
24 providing those documents would not be unduly burdensome.

25 Then comes the question of a privilege review for any

documents where Akin Gump perceives that there is a privilege. In this case, I think the fact that Shareefah is a 50 percent owner of this corporation and presumptively, to the extent that Akin Gump was acting on behalf of FMA -- and there is some ambiguity in the papers now as to whether they were acting for Thunayan in his personal capacity or for him in his corporate capacity, but certainly for those tasks that Akin Gump has undertaken on behalf of the corporation, Shareefah is a natural applicant to fall within this fiduciary exception.

To show good cause to fall within the exception, there is a multi-prong test, a non-exhaustive test. We recited about nine prongs of this in our opening papers. Akin focused on three, albeit acknowledging that they weren't giving a full-throated analysis in their papers.

But the three prongs that they did focus on were whether she had colorable claims in the BVI proceeding; secondly, whether discovery was readily available through alternate sources; and third, whether petitioner, as we were discussing before, is blindly fishing.

So I think those three prongs map on to arguments that I've already addressed so far today in that the colorable claims she has in the BVI proceedings are claims for control of FMA and for the waste of corporate assets.

In terms of the discovery being readily available through alternate sources, I think ultimately the other roads



1 that Akin has presented all lead back to Akin. Those are where  
2 the documents are. So to the extent that it's forcing  
3 Ms. Allergan to appoint a receiver and then come back to them  
4 or go to her brother, I think the road always leads back to  
5 Akin.

6 THE COURT: This is a question that is really in  
7 Mr. Wohl's bailiwick, but I'm going to ask you because you may  
8 have some information on the subject.

9 What is your understanding of the circumstances that  
10 occasion Akin Gump to have these documents? I understand  
11 they've done work for FMA, but it would not, in the ordinary  
12 course of most representations, cause a law firm to have  
13 banking records of its client and the level of detail which you  
14 seem to be seeking.

15 I don't understand them to be disputing the general  
16 concept that they have responsive documents. They've urged  
17 that it's burdensome to produce them.

18 What is your version of the answer to that question?

19 MR. WILSON: Well, your Honor, first of all, with the  
20 caveat that you're right, this is something which is not in my  
21 personal knowledge, but drawing inferences from the other  
22 documents that we've been able to obtain and conversations with  
23 other parties, it's our understanding that in this four-year  
24 period, Thunayan, who is an individual, sought the advice of  
25 Akin to effectively help him manage the business.

I don't know what the core activities were of Akin. Perhaps the obvious legal activities would be the purchase and sale deal work involving the inventory, but I do understand that Akin was involved in retaining WithumSmith, which was the accounting firm, and tasking WithumSmith with the scope of their accounting work. So there may be back-and-forth with Withum over what that work is.

There have been several accounts, bank accounts, set up at banks in New York and in the United States that Akin Gump was involved in setting up the bank accounts. We've seen that some of the signatories to some of these accounts include individuals who were formerly employed by Akin Gump.

Somewhat inexplicably, there are a series of payments that have been made to a former employee of Akin Gump and that person's daughter. So there seems to be a fairly intimate relationship of moving of monies sort of both to people who are affiliated with Akin Gump that are not 100 percent explained by the retainer agreement because it's an individual with signatory authority.

We've also seen checks with the same address as the bank account set up by Akin Gump that are dispensing funds with the name of FMA and also the name of the individual who has signatory authority and the name of what appears to be a shell company that was set up by that Akin Gump former employee. So there is some complexity around what the work was that was

1 being done by Akin Gump and what the work was that was being  
2 done by Akin Gump employees.

3 THE COURT: All right.

4 MR. WILSON: Your Honor, in terms of the fiduciary  
5 exception, our submission is that Ms. Allergan fits naturally  
6 within that exception and Akin has not really put forward a  
7 very robust opposition to that position.

8 The third point that we had made about waiver is  
9 really -- I think the most significant case on that point is  
10 the third *Chevron* case that we cited. I believe we cited it  
11 first in our reply papers. It's 749 F.Supp.2d 170. That was  
12 the third in a line of cases where Judge Kaplan ordered the  
13 waiver of attorney-client privilege from Steven Donziger.

14 I think the touchstones from that case are that first  
15 that there is a presumption that we have a privilege log in  
16 order to facilitate the kind of conversation that we're having  
17 today, and it's incumbent on the recipient under local  
18 Rule 26.2(c) to either provide such a log or seek an  
19 application for more time or seek a protective order, none of  
20 which has happened here.

21 I think the circumstances in which courts order  
22 waivers are where the failure to provide the privilege log is  
23 used as a sword. To the extent that Akin Gump is arguing that  
24 no subpoena should issue because it's unduly burdensome but on  
25 the other hand they haven't provided any evidence of even the

1 categories of privilege, it makes it difficult for, I believe,  
2 them to stand on privilege as a grounds for denying the  
3 subpoena.

4 With that, your Honor, I think I would conclude by  
5 saying that for these reasons, our view is that the eight  
6 requests that we made in the original subpoena are sufficiently  
7 tailored; that 7,000 documents in a commercial case that  
8 involves the sale of \$24 million in assets is not inherently  
9 unduly burdensome.

10 THE COURT: I think I have your argument.

11 MR. WILSON: Thank you, your Honor.

12 THE COURT: Mr. Wohl.

13 MR. WOHL: Thank you, your Honor.

14 Our view, your Honor, is that Akin Gump is put in a  
15 difficult and unfair position here, as is the Court, by the  
16 applicant seeking to come to Akin Gump as almost but not quite  
17 the first stop on this discovery effort.

18 What should happen in this situation, we would submit,  
19 is -- and the answer to one of your Honor's questions -- that  
20 you can see from the pleadings in the BVI that Mr. Alghanim is  
21 indeed a party to the BVI proceedings and that FMA itself is a  
22 party to the BVI proceedings.

23 So what should happen in the ordinary course, we would  
24 submit, is that if Ms. Alghanim had a claim to make of any of  
25 the varieties that she's sort of hinted at in these proceedings

1 but has never really said, I definitely want to make this  
2 claim, what she should do is bring that claim to the BVI court  
3 where she claims that she already has some kind of proceeding  
4 pending, assert whatever that claim is. If there is a receiver  
5 appointed, there's a receiver appointed. The receiver then  
6 asks Akin for any materials that the company would be entitled  
7 to.

8 They also requested provisional liquidators to be  
9 appointed down in the BVI. That was denied when they sought a  
10 winding up of the company. If there were provisional  
11 liquidators appointed or permanent liquidators appointed, then  
12 they could make a request to Akin, and there would be no  
13 privilege issues. There would be no confidentiality issues at  
14 all. It would be a very simple, regular process.

15 Or if Mr. Alghanim were a party to the BVI proceeding  
16 or appeared in the BVI proceedings, then -- he already is a  
17 party -- he could make the request to Akin.

18 And, again, there wouldn't be any privilege issues.  
19 There wouldn't be any complexity to it. Whatever documents  
20 belong to FMA could be shipped to the proceedings in the BVI,  
21 and it would be an altogether simple process. Akin would not  
22 be required to engage in any kind of concerns about Rule 1.6  
23 confidentiality obligations. It wouldn't be obligated to have  
24 any issues with respect to privilege either.

25 THE COURT: The problem is if we were writing on a

1 blank slate as to what does use in a foreign proceeding mean as  
2 written into 1782, it would be a most reasonable argument that  
3 you've presented. But it would require undoing quite a lot of  
4 case law, including *Intel* itself. It's settled law that there  
5 need not be a proceeding as long as it's reasonably  
6 contemplated.

7 So to say, which I perfectly understand -- and maybe  
8 if I were sitting around a table drafting a statute, you might  
9 have a sympathetic ear -- go file the proceeding. Go ask the  
10 court for the documents.

11 And in fact, maybe in my version of the statute, if  
12 the court wants some help, the foreign court wants some help,  
13 all they need to do is say, please help, and the U.S. court  
14 will help. That's not 1782, and that's not the jurisprudence  
15 under it however, as you know.

16 MR. WOHL: I understand exactly what your Honor is  
17 saying, but I would respectfully suggest that this case falls  
18 outside a case where there is a proceeding pending or  
19 reasonably contemplated.

20 Let's look at what has gone on so far in the BVI, and  
21 let's look at the suggestions of what Ms. Alghanim thinks that  
22 she might be interested in. First of all, there was a  
23 receivership created down there. That receivership is over  
24 with because the receiver resigned.

25 By the way, it was an extremely narrow receivership as

1 you can see in our papers. That receiver has resigned. That's  
2 over with.

3 In addition, there was an application for the winding  
4 up of the company, which under the circumstances that  
5 Mr. Wilson has described would seem like a claim that one might  
6 make.

7 That was heard at a hearing in December of 2014, and  
8 that was denied. In addition, at the time of the denial, the  
9 judge made a number of observations that seemed to throw a good  
10 deal of cold water on the kinds of claims that Mr. Wilson is  
11 now making.

12 He did not find that Mr. Alghanim was incapable of  
13 running the company. He rejected the claim that Ms. Alghanim,  
14 the sister, is entitled to information. He said, she's not  
15 entitled to the information she wants as a shareholder. He  
16 said that she just seems to be trying to interfere with the  
17 management of the company.

18 THE COURT: This is 2015?

19 MR. WOHL: This is 2014, December of 2014. And the  
20 judgment was issued I believe in January of 2015.

21 THE COURT: I agree with you there are certain  
22 disadvantages to the petitioner trying to ride two horses here  
23 of there's a proceeding pending and there's a proceeding  
24 reasonably contemplated. Trying to ride them at the same time  
25 doesn't work all that well.

1 I'm not sure I understand the argument as to a  
2 reasonably contemplated proceeding.

3 MR. WOHL: All right. Let's look at what the  
4 petitioner's papers indicate. What are their complaints. She  
5 complained that she advanced money to the company and it hasn't  
6 been repaid. She talked about at some point that Mr. Alghanim  
7 isn't really capable of running the company, a claim that, in  
8 2014 anyway, the judge in the BVI rejected.

9 She claimed that she wants a disclosure of domain  
10 names. She says she wants a distribution of assets. She says  
11 there is \$9 million that she's received. She thinks she's  
12 entitled to another \$3 million.

13 Does she say that she wants to bring a claim for  
14 repayment of the loan? No. Does she say that she believes  
15 that she's entitled to dividends or a distribution of assets of  
16 the corporation? No. She doesn't say that. She just says  
17 she's unhappy that she didn't get more money.

18 THE COURT: Well, certainly, as described in the  
19 courtroom this afternoon, I grant you there may be something of  
20 a gap in the way things are described, but as described here  
21 today, it seems to be a claim of dissipation and perhaps  
22 conversion of assets which is a rather serious charge.

23 MR. WOHL: That is a serious charge, your Honor. And  
24 there is no reason why, if she wanted to assert that in the  
25 BVI, she couldn't assert it. Indeed, the expert affidavit that



1 she provides has the attorney, the BVI attorney down there,  
2 saying, if she wanted to bring a claim, she could bring it  
3 under the same index number that she has already acquired down  
4 there.

5 Does that really sound like it's within reasonable  
6 contemplation, if she wanted to bring a claim? She doesn't  
7 even say, I have a claim, and this is what the claim is. She  
8 instead has the lawyer saying, if she wanted to bring a claim,  
9 and then she has other assertions in her papers that seem quite  
10 like a fishing expedition.

11 She says she wants to get material to shed light on  
12 the accounts and transactions undertaken for the benefit of  
13 FMA. She wants to determine the quantum and location of funds.  
14 She says -- this was another statement -- she may be required  
15 to pursue other requested remedies.

16 Then the attorney says, in the event that the claimant  
17 seeks further relief, then she could bring it under that index  
18 number. So I think these are assertions that have a good deal  
19 more vagueness, I would submit to your Honor, than the kinds of  
20 cases like *Intel* and the Cravath cases which we're all familiar  
21 with.

22 In those cases, there was usually a complaint had been  
23 drafted, or there was a specific assertion of this is my claim.  
24 That's not what we have here. We have somebody engaging in  
25 what looks much more like some kind of an investigation and not

1 an engagement of an attorney to bring a specific claim or even  
2 an assertion of a specific claim.

3 And that makes it very difficult for the Court --  
4 for example, just sort of skipping ahead a little bit,  
5 Mr. Wilson refers to the fiduciary exception and says, well,  
6 are there colorable claims.

7 The question is what is the claim. Is the claim for  
8 distribution of assets? Is the claim for a winding up of the  
9 company? Is the claim for a repayment of the loan? I think in  
10 his papers, the reply papers, they refer to questionable  
11 transactions. What transactions are they?

12 It seems to me it makes it very difficult for the  
13 Court to evaluate whether there is a claim under reasonable  
14 contemplation in these circumstances. And I would point out  
15 that, as I understand it, the cases indicate that it's not just  
16 a claim that has to be in reasonable contemplation. It's the  
17 disposition that has to be in reasonable contemplation.

18 Certainly it's very unclear here whether she wants to  
19 go back to BVI and try to get a winding up of this company.  
20 Does she want to take over the company? Exactly what does she  
21 want to do? I think that there is a vagueness there that is  
22 far beyond what is normally involved in these 1782  
23 applications.

24 As sort of a related point, that's what I would  
25 describe as the statutory shortfall where I think it is

doubtful that they actually meet the statutory requirement, but where they clearly fail, it seems to me, is under the first discretionary requirement which is where the courts have indicated that if the subject of the discovery is a party in the foreign proceeding, then, as the courts have said -- I believe *Intel* and the Second Circuit have said that there is less need for 1782 intervention.

And that is certainly the case here because, as all the captions indicate on these various orders, the parties to that BVI proceeding, whether it's alive, dead, whatever status it's in, are Ms. Alghanim, Mr. Alghanim, and FMA.

THE COURT: What's urged here, of course, is that since Thunayan has gone radio silent in recent months, the whole underpinning of the first *Intel* factor really becomes greatly weakened because this individual is not available to obtain documents from.

He's gone is the assertion. Your client can't find him. If that's the case, he may be someone who can, in principle, be named as a party but not necessarily a person from whom documents can be obtained.

Are you representing that these documents that are in the possession of Akin Gump exist in the BVI?

MR. WOHL: No. I'm not representing that. I don't know what's in the BVI. What I am suggesting, because I'm not a BVI lawyer, but it would seem to me -- I have seen, and I

1 believe we put in our papers -- that in the BVI proceeding,  
2 Mr. Alghanim, I believe, submitted an answer. So he appeared  
3 in that proceeding. I think it was in 2014, but I'm not sure.

4 THE COURT: I don't blame you one iota for seizing  
5 upon the fact that the petitioners are trying to ride those two  
6 horses, and there are distinct disadvantages to trying to do  
7 that. He was a party to the first proceeding, if you will, and  
8 was there and answered. I take your point. It's a very fair  
9 point.

10 Except it's also fair that you point out that those  
11 proceedings are stale. It may be technically an open case, but  
12 there's nothing going on in them. That's also a fair point  
13 which turns the mind towards a reasonably contemplated  
14 proceeding.

15 I understand it, but there is a limit to how far it  
16 goes if there is no assurance that these documents are present  
17 in the BVI and no assurance that this individual can be found  
18 today such as to direct or order the production of the  
19 documents.

20 MR. WOHL: Well, I would think, your Honor, that if  
21 the proceeding were continued in the BVI and Ms. Alghanim  
22 sought relief there, as her expert says, if she were to seek  
23 relief -- she would seek it under that what we would call an  
24 index number -- it would seem to me that the BVI has to have a  
25 process by which if the company which is sought to be either

1 wound up or put into receivership doesn't appear and the sole  
2 director doesn't appear, I would think that there must be some  
3 form of relief that the BVI court could order.

4 It would seem to me very likely it would be a receiver  
5 or a liquidator, and the receiver or the liquidator, if the  
6 documents aren't in the BVI -- and I have no idea whether there  
7 is anything in the BVI other than court, whatever, but it would  
8 be quite easy for them to contact Akin and say, we're the  
9 authorized representative of this company. They are your  
10 former client. We want our documents.

11 I would imagine that Akin would just turn them over,  
12 but they wouldn't have these confidentiality issues, and they  
13 wouldn't have the privilege issues. It seems to me that that  
14 is a fairly compelling consideration in this situation.

15 For the petitioner to say that they can't get the  
16 documents through discovery in the BVI right now because there  
17 is no active proceeding pending is really to turn the situation  
18 on its head.

19 The reason that there is no active proceeding pending  
20 is because Ms. Alghanim has not initiated a proceeding, and  
21 indeed she hasn't even said what kind of proceeding it is she  
22 would like to initiate.

23 And as our papers indicate and I think makes perfect  
24 sense to the Court, the BVI lawyer whose affidavit we  
25 submitted, if she were to do that, the next thing that would

1 happen is there would be some kind of a conference, there would  
2 be discovery and disclosure orders issued, and that problem  
3 would be resolved, as far as Akin is concerned.

4           Consequently, that's why we think that 1782 is really  
5 not the process that should be engaged in here, and the fact  
6 that Mr. Alghanim is difficult to locate should not be a  
7 serious obstacle to the enforcement by a BVI court over a BVI  
8 corporation.

9           And the issue of what the law is under the BVI and  
10 whether Ms. Alghanim is entitled to distributions, she's  
11 entitled to information -- all those issues of BVI law could  
12 easily be dealt with by a BVI court, including their  
13 entitlement to information.

14           THE COURT: Now talk to me about the invasiveness and  
15 the burdensomeness of this. Specifically the first thing that  
16 comes to mind is looking at the narrowed subpoena, I can  
17 certainly see where, as drafted, there could be privileged  
18 materials.

19           All documents, for example, in category 5, including  
20 invoices and emails concerning transactions for the sale of  
21 assets of FMA, Inc. Well, if Akin Gump represented FMA on the  
22 sale of assets, I could conceive there would be privileged  
23 documents there.

24           But there are other categories where it would not  
25 appear to be the case that there would be a privilege that

1 would attach such as category 2, documents sufficient to show  
2 all persons or authorized signatories for any bank accounts  
3 held by FMA, FMA LLC, or related companies, or all invoices for  
4 FMA, or for that matter, all bank transactions or credit card  
5 transactions.

6 I don't know how much of this Akin Gump has, but I  
7 don't see where there would be any burden of privilege review  
8 as to categories such as that.

9 MR. WOHL: I certainly agree with your Honor that the  
10 narrowing of the subpoena vastly reduces the privilege issues.  
11 No question about that. It doesn't totally solve the problem  
12 from Akin's point of view because the proceedings that have  
13 occurred so far certainly indicate that FMA opposes giving  
14 information to Ms. Alghanim that she's not entitled to.

15 And indeed, the judge in the BVI said that as a  
16 shareholder she was not entitled to the information that she  
17 was requesting in that proceeding, and consequently, Akin is  
18 not in a position to just voluntarily give up the material of  
19 its former client.

20 THE COURT: I perfectly understand that. That's why  
21 they need to be here in this courtroom, and it's a perfectly  
22 reasonable thing for them to do. It would be surprising -- it  
23 may raise a host of other issues -- if they did not press the  
24 issue. So I perfectly understand that.

25 Now, is there a log that Akin Gump has prepared

1 pursuant to the local rule in response to a subpoena served on  
2 it?

3 MR. WOHL: We have not done that, your Honor, because  
4 it was our view that there were these threshold issues and that  
5 indeed part of the burden of the 1782 subpoena would have been,  
6 when the subpoena first came in, to log these approximately  
7 7,000 documents.

8 The effort would be much smaller now because of the  
9 fact that the subpoena has been narrowed.

10 THE COURT: Let me ask you this: The 7,000 number is  
11 the number that relates to the original subpoena, not the  
12 narrowed subpoena?

13 MR. WOHL: Correct, your Honor.

14 THE COURT: Do you happen to know the number that  
15 relates to the narrowed subpoena?

16 MR. WOHL: I'm not sure exactly what this number  
17 means. We've talked about a number of around 3,000. I have to  
18 say I'm not sure exactly what that includes, but it's sort of  
19 indicative of the fact that the narrowing of the subpoena very  
20 substantially reduces the privilege issue, and I certainly want  
21 to make it clear to the Court that that is the case.

22 Even the narrowed subpoena, however, does raise a  
23 number of issues in the sense that they ask for the documents  
24 relating to any escrow account related to FMA.

25 It seems to me -- I'm not sure why it would be --



1 let's put it this way: Those are not the same kinds of  
2 documents that are in invoices and things of that sort.

3 In number 4, there is sort of an interpretation issue  
4 of documents related to expenses using funds from FMA, Inc.  
5 that are not direct expenses of FMA, Inc.

6 Then in number 3, they don't just say checks, bank  
7 transactions, and credit card receipts. They say details of  
8 those. I'm not sure exactly what that means.

9 THE COURT: I take your point on 3 and 4.

10 Go ahead.

11 MR. WOHL: Then one other thing is that I believe in  
12 their reply papers, the petitioner said that she was  
13 eliminating everything related to FMA LLC or related companies,  
14 and now it appears again in request number 2. I don't know  
15 whether that's a mistake or if that was intended.

16 As I said, the privilege issue is certainly  
17 substantially reduced. The confidentiality issue is not  
18 eliminated because we have the impression that the former  
19 client of Akin does not want to voluntarily release this  
20 information.

21 I think that's all I have, your Honor.

22 THE COURT: Thank you, Mr. Wohl.

23 Mr. Wilson, why don't you begin, if you will, with  
24 regard to categories 3 and 4 of the narrowed subpoenas.

25 MR. WILSON: Your Honor, turning to category 3,

1 details of all checks, etc., my understanding is that from  
2 looking at the other side of this, from some of the production  
3 from the banks, that there are certain transactions that  
4 Ms. Alghanim is aware of, that a check amount was sent.

5 But to the extent that Akin has related information,  
6 whether it is a canceled check that has a notation or any other  
7 documentation that relates to that transaction, that we want to  
8 capture that small penumbra around the check and not just get  
9 what we have in circumstances already, just a line item that  
10 this amount of money went.

11 THE COURT: I don't know that that does it in any  
12 event. It may be that if you got all checks, bank  
13 transactions, credit card, debit cards, and statements  
14 concerning -- not concerning FMA. I guess it would be of FMA,  
15 wouldn't it?

16 MR. WILSON: Yes.

17 THE COURT: "Concerning" is a word defined in courts'  
18 local rules. So I will leave it alone.

19 MR. WILSON: Yes, your Honor.

20 THE COURT: It seems to me that your challenge there  
21 is the words "details of."

22 Let me hear with regard to paragraph 4.

23 MR. WILSON: Your Honor, we've seen a number of  
24 payments made to Akin Gump-related individuals and, as I  
25 referenced earlier, companies, relatives. They're not

1 obviously FMA expenses. For example, I believe travel expenses  
2 for the child or health expenses for the child of an Akin Gump  
3 employee.

4 THE COURT: I got your point on that. You may be  
5 entitled to some relief in terms of discovery, but the way 4 is  
6 written, it puts the lawyer in a position of being a judge of  
7 the actions of his former client.

8 MR. WILSON: Your Honor, we would be happy to  
9 eliminate that phrase and end the request with FMA, Inc. The  
10 effort to put that phrase in is just our good-faith attempt to  
11 try to further narrow it, but I certainly think that documents  
12 concerning payments for expenses using funds from FMA, Inc. is  
13 relatively precise in and of itself and doesn't need that  
14 qualifier.

15 THE COURT: Let me inquire further.

16 What is captured in the words "for expenses"? Why  
17 isn't what you're seeking documents concerning any payments  
18 from FMA, Inc.?

19 MR. WILSON: Even better, your Honor.

20 THE COURT: It's not a question of whether it's better  
21 but the question of when you include the words "for expenses,"  
22 what does that capture? When you look at all the payments, and  
23 then there's the word "expenses," what is the reader of the  
24 subpoena supposed to be doing at that point?

25 MR. WILSON: Well, your Honor, the reason I said "even

1 better" is I think the Court's permutation is broader and  
2 captures a wider range of materials, and I think that that is  
3 certainly satisfactory to us. The reason for including  
4 "expenses" is it seems it's a subset of payments.

5 But given what we're talking about here in terms of  
6 the scope of the request, I think it's clearer and slightly  
7 broader but not that much broader to just eliminate "expenses"  
8 as well.

9 THE COURT: Anything else you wanted to comment on on  
10 Mr. Wohl's presentation?

11 MR. WILSON: Just briefly, your Honor, I would say  
12 that generally with respect to the applicability of 1782 to  
13 these circumstances, I would just turn the Court back to the *In*  
14 *re Kiobel* case from 2017. I think that's pretty closely on all  
15 fours with us here, a contemplated proceeding against Cravath.

16 In terms of the precision with which Ms. Alghanim has  
17 articulated her contemplated claim, I think that most directly  
18 it's for recovery of the \$3 million in lost assets and  
19 ultimately the control of the company and potentially also  
20 breach of fiduciary duty claims.

21 But I also think there is a balance to be struck here  
22 where she doesn't have to telegraph attorney work product in  
23 terms of all of the claims she's anticipating to bring, but  
24 she's provided for sufficient specificity to allow for a  
25 narrowed subpoena and a targeted request, and I think we have

1 that here.

2 The last thing I would say with regard to  
3 confidentiality -- and I didn't mention this in my opening  
4 remarks -- is our understanding of both Rule 1.6 and also the  
5 language in the materials that Akin has represented it provided  
6 to Mr. Thunayan, although they did not provider a retainer  
7 agreement that showed it was provided to him, but both of those  
8 documents provide for an exception where there is court-ordered  
9 production.

10 I understand that we are here today so that there is  
11 no ambiguity about the voluntariness of the production, but I  
12 don't see 1.6 as a barrier to the Court ordering the subpoena.  
13 Thank you.

14 THE COURT: Thank you all very much. I'll try and get  
15 something out relatively quickly on this. Thank you for the  
16 very fine presentations.

17 MR. WILSON: Thank you, your Honor.

18 MR. WOHL: Thank you, your Honor.

19 (Adjourned)  
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